

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RONALD L. RUMSEY
Claimant

VS.

CITY OF TOPEKA
Self-Insured Respondent

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Docket No. **239,265**

ORDER

The respondent applied for review of the Award of Administrative Law Judge Brad E. Avery, dated August 9, 2000. The Workers Compensation Board heard oral argument in Topeka, Kansas, on February 2, 2001.

APPEARANCES

Claimant appeared in person and by his attorney, Clinton E. Patty. Respondent and insurance carrier appeared by their attorney, Jeff K. Cooper.

RECORD & STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge found claimant suffered a micro-traumatic binaural hearing loss arising out of and in the course of employment for the respondent which resulted in a functional impairment of 39.5 percent.

The respondent contends the claimant failed to establish he suffered a hearing loss while working for the respondent. Respondent further contends the claimant failed to give timely notice, and in the event there is a compensable injury, raises the issue of nature and extent of disability.

The claimant filed a motion to strike respondent's brief to the Workers Compensation Board. Claimant asserts that the respondent's brief was due on September 25, 2000, and was not filed until November 3, 2000. In addition, the claimant requests attorney fees pursuant to K.S.A. 44-536a for preparing the motion to strike.

FINDINGS OF FACT

Having reviewed the whole evidentiary record filed herein, including the stipulations of the parties, the Board makes the following findings of fact and conclusions of law:

The claimant has served as a firefighter for the City of Topeka since August 1, 1973. In the course of his employment as a firefighter, the claimant was exposed to occupational noise including sirens, air horns, power tools, diesel engines on trucks and alarm systems in buildings. When he initially started his employment, he rode on the back of the fire truck exposed to the full sound of the sirens. He further testified that the noise at the scene of a fire included diesel motors running at high RPMs to pump water to the fires, smoke ejector fans, alarm systems still going off in the buildings, power tools, chain saws as well as sirens from other vehicles arriving at the scene.

The claimant testified that the total number of runs he had made in his 27 years of employment with the respondent was 2,668. However, the claimant testified that as a firefighter a large percentage of his time is spent in the station house.

The claimant noted that in early 1993 the respondent provided an on-board communication system and enclosed the cabs of the fire trucks to reduce the noise exposure. The claimant testified that the David Clark communication system is only used while the firefighters are riding in the cab of the fire truck and is not worn at the scene or prior to entering the cab of the truck. The claimant testified that since implementation of the David Clark system in 1993 the exposure to noise had been reduced.

The claimant advised the doctors of his non-occupational activities that exposed him to noise. The claimant testified that he would go hunting once a year and that he wore ear protection while hunting. The claimant further testified that he rides motorcycles but that he always wears earplugs and when he is going to be on an extended trip he wears a full face helmet.

The claimant testified that although he suspected it earlier, he first noticed hearing loss in late 1996 or early 1997 and the hearing loss was gradual. The claimant testified he had an extensive hearing test in 1997 which showed an approximate 30 percent hearing loss in both ears and that subsequent to the examination he purchased hearing aids for \$4,200.

When advised that he needed hearing aids the claimant notified respondent that he was filing a workers compensation claim. The respondent sent the claimant to a doctor for a second opinion.

During the course of litigation, the Administrative Law Judge ordered an independent medical examination with Dr. Bradley S. Thedinger. Dr. Thedinger opined that the claimant had sustained a bilateral moderate sensorineural hearing loss and using the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition, calculated the hearing loss percentage. Dr. Thedinger concluded the claimant had a 41 percent right hearing impairment and 41 percent left hearing impairment and 41 percent binaural hearing impairment. The doctor opined that the claimant's moderate sensorineural hearing loss was of a type secondary to chronic noise exposure resulting from work. The doctor further recommended the claimant avoid exposure to noise levels while fighting fires if he wished to prevent further progressive hearing loss.

When the claimant presented Dr. Thedinger's independent medical examination report to the respondent, he was immediately put on sick leave and has not been employed as a firefighter since July 28, 1998.

Dr. Peter Bieri testified on respondent's behalf. Dr. Bieri did not examine the claimant but upon a review of claimant's audiograms concluded the claimant had a binaural hearing loss of 38.1 percent pursuant to the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition. Dr. Bieri concluded that several factors including the normal aging process, work-related noise exposure and non-occupational noise exposure all contributed to the hearing loss. The doctor then opined that the current hearing loss was attributable to all of the foregoing factors equally.

Dr. Bieri testified that he was provided with claimant's medical records including hearing audiogram tests. From 1996 through the most recent audiograms, the findings were essentially the same or consistent. Dr. Bieri further testified that the audiograms indicated that the type of hearing loss the claimant had sustained was due to chronic noise exposure. Dr. Bieri was asked if following implementation of the hearing protective measures by the respondent whether any of the impairment attributed to the claimant would be as a result of work activities from 1993 through the present and Dr. Bieri concluded that a portion of the hearing loss he assigned to the claimant would be attributable to work-related noise exposure.

CONCLUSIONS OF LAW

The claimant filed a motion to strike the respondent's brief to the Board and requested attorney fees for preparation of the motion to strike. K.A.R. 51-18-4 provides that the appellant's brief shall be submitted within 30 days from the date of filing the

application for review. It is undisputed that the respondent's brief was to be filed by September 25, 2000, and it was not filed until November 6, 2000.

Upon objection due to an untimely filing of a brief, the Board defers to the mandatory language of the regulation and does not consider the brief. Accordingly, the claimant's motion to strike is granted and the respondent's brief will not be considered in the determination of this matter.

The claimant additionally requests attorney fees pursuant to K.S.A. 44-536a for preparation of the motion to strike the respondent's brief. Briefs assist the Board in defining and focusing on the pertinent facts and law that a party considers significant to the determination of the appeal. A brief is not evidence. It is simply a document that states a party's position on the facts and law pertaining to a specific issue. The adoption of a regulation that sets a briefing schedule is to establish a time frame for completion of the appeal and minimize delay. However, the case will proceed to hearing in the absence of briefs and with de novo review the Board can address those issues that were presented to the Administrative Law Judge or that are raised at oral argument. It is the Board's conclusion that late filing of a brief does not rise to the level of a frivolous pleading as contemplated by K.S.A. 44-536a and the claimant's request for attorney fees for filing the motion to strike the respondent's brief is denied.

The respondent argues that the claimant failed to establish that there was any worsening of his hearing from 1996 through the most recent audiogram performed May 23, 2000. The respondent notes that Dr. Bieri testified that he looked at claimant's audiograms and from 1996 through May 23, 2000, the findings were essentially the same or consistent. The difficulty with accepting the respondent's position is that Dr. Bieri, in response to a question whether the claimant had any noise induced hearing loss after 1993, noted that there has been some deterioration and no doubt there is some element of occupational noise exposure involved. The following colloquy occurred in Dr. Bieri's deposition:

Q. Doctor, if we assume that those noise levels are representative of the work that Mr. Rumsey performed since 1993, then further considering the hearing protection measures of the David Clark system, do you have an opinion, within a reasonable degree of medical certainty, whether or not Mr. Rumsey had any noise induced hearing loss after 1993?

A. These particular --

Q. And some of those are of the Police Department.

A. Yeah. Surveys and documents aren't conclusive of it. I would base this more on the serial audiograms. I think there has been some deterioration, and I generated a letter in

response to this, that any change, I believe, would be multi-factorial in nature. I think there is no doubt there is some element of occupational noise exposure involved.¹

In addition, the claimant testified that in 1997 he was examined and determined to have an approximate 30 percent hearing loss to each ear. Dr. Thedinger examined the claimant on July 22, 1999, and determined the claimant had sustained a work-related hearing loss of 41 percent to each ear. Upon review of the audiograms, Dr. Bieri concluded the claimant had a hearing loss of 38.1 percent. These findings clearly demonstrate a progressive worsening of the claimant's hearing loss.

Upon review of the entire evidentiary record, it is the Board's determination that the claimant has met his burden of proof to establish that he sustained a work-related hearing loss arising out of and in the course of his employment and that such loss continued through the last day worked.

As previously noted, the evidence concerning the percentage of functional impairment sustained by the claimant was provided by Drs. Thedinger and Bieri. The Administrative Law Judge accorded the opinions equal weight. The Board agrees and adopts the Administrative Law Judge's rationale and finding that the claimant sustained a 39.5 percent functional impairment.

This claim was filed as a series of injuries occurring each and every day worked through the last day worked. At the regular hearing the respondent denied timely notice. It was the claimant's uncontradicted testimony that the respondent was notified that he was filing a workers compensation claim after he had gone to have his hearing tested and hearing aids were prescribed. Moreover, the filing of the application for hearing would constitute notice where a continuing series of accidents are alleged. Because the injury to the claimant's hearing from his work activities continued through his last day worked on July 28, 1998, notice was timely.

It should be noted that the record in this matter consists of the regular hearing, the deposition of Dr. Bieri, the report of Dr. Thedinger and the evidence included by stipulation. The claimant filed a voluminous submission brief with the Administrative Law Judge that included numerous so-called exhibits. Those "exhibits" are not part of the evidentiary record. The attached exhibits included, for example, medical reports which cannot be considered without the supporting testimony of the physician.² The proceedings in workers compensation are adversarial and the system has been well served by requiring the

¹ Deposition of Peter Bieri, M.D., dated July 6, 2000; pp. 14-15.

² See K.S.A 44-519.

opinions of experts to be based on testimony subject to cross-examination.³ Therefore, the attachments to the respondent's brief which were neither stipulated to nor offered during the proceedings before the Administrative Law Judge were not considered by the Board upon this review.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated August 9, 2000, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of April 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

Copies to:

Clinton E. Patty, Attorney at Law
Jeff K. Cooper, Attorney at Law
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

³ *Roberts v. J.C. Penney Co.*, 263 Kan. 270, 949 P.2d 613 (1997).